



LIVINGSTON EMPLOYER BREEZE

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How do you know if a worker is an employee that you must withhold taxes for or an independent contractor who is responsible for his own taxes? In order to determine whether someone who does work for you is an employee or an independent contractor, you need to evaluate several factors regarding your relationship with the worker. When evaluating these factors, keep in mind the nature of the job and how your industry usually handles such situations. This information will guide you in determining the worker's role. In general, the more control you exercise over the worker, the more likely it is that he is an employee.

1. Do you control when and where the person does their work?
2. Does the worker use your tools and equipment or his own?
3. Is the worker able to hire others to assist with the work without your approval?
4. Does the worker purchase the necessary supplies and services at a place of his own choosing?
5. Do you determine what specific tasks are to be done by what specific worker?
6. How much guidance do you provide the worker about how to do the job?

7. Do you pay the worker a flat fee or an hourly rate?
8. Do you reimburse the worker for expenses that are incurred to get the job done?
9. Does the person perform the same services for others?
10. Do you have a written agreement with the person regarding the work to be done?
11. Will the person work for you indefinitely or just until a certain job is completed?
12. Is the work the person does an integral aspect of your business or is it ancillary?



Each of the above questions addresses the degree of control you have over the worker. Remember to consider each of these factors in light of the normal practices for the given industry. For example, it is more common for a trade worker who is an employee to use his own tools than for an office worker who is an employee to provide his own office equipment. No single factor is determinative.

Several factors may indicate a degree of control even though the person is an independent contractor. An example: You hire a plumber to install new fixtures when remodeling your home. You require the job to be done at a certain time and at a certain place. You pay an hourly rate and reimburse for expenses. All of these factors indicate a certain degree of control, but the person is still an independent contractor. After all factors are considered, the control is with the worker.

For more help in determining whether a person who works for you is an employee or independent contractor, get IRS publication 15a, Section 2.

From December 2007 information	MT	U.S.
Unemployment rate/Non-seasonally adjusted	3.7	4.8
Area Unemployment Rates	2006	2007
Gallatin	1.9	2.6
Meagher	4.3	6.5
Park	3.3	4.4
Sweet Grass	1.2	1.6

Montana Is Not an At-Will Employment State

By Sue Hanken

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Montana is the first state to have adopted an alternative to the ‘employment-at-will’ law. The **Wrongful Discharge From Employment Act** (WDFEA) outlined in Montana Code Annotated 39-2-903 to 915, was initially adopted in 1987 in response to a series of Montana Supreme Court decisions beginning around 1980 that favored the plaintiff and resulted in large verdicts against employers who were ordered to pay compensatory and punitive damages.

The WDFEA was initially established as a way to protect both the employee and the employer. It currently allows an employee the right to lawfully dispute termination of employment or disparate treatment and it limits the amount of damages that an employee can receive for a wrongful discharge verdict. Damages are limited to up to four years of lost wages and benefits, with interest. Interim earnings are subtracted. Pain and suffering damages are excluded, however, punitive damages are allowed by law if it is established by “clear and convincing” evidence that the employer engaged in fraud or acted out of malice against the employee, 39-2-905.

Before the passage of WDFEA, job growth was in decline and the wrongful discharge cases prevalent at that time were seen as contributing because employers were paying what was considered exorbitant wrongful discharge penalties. Since its passage, the Montana job growth rate did return to a level of normalcy in comparison to the growth rate prior to 1980. The WDFEA is credited for this improvement since the damages that a discharged employee may receive was limited under the new law. Studies have shown that the WDFEA was a major factor that helped reestablish a stable economic environment in which employers realized greater profitability and business expansion and hired more employees.

An Amendment to the Montana Wrongful Discharge From Employment

Act passed through Montana Legislature and became effective October 1, 2001. It reads as follows:

SENATE BILL NO. 4 Introduced by D. Grimes

(2) (a) During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason. (b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire.

See 39-2-904. Elements of wrongful discharge -- presumptive probationary period.

This amendment creates a presumptive probationary period and clarifies that the termination of employment outside of the probationary period must be for good cause, covers all non-union employees who are not otherwise subject to an employment contract, and provides the employee a right to protest a termination from employment in court or before an arbitrator.

According to Montana Code 39-2-903 (5) Definitions, “good cause” means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reasons. Within the definition of good cause, an employer would properly train, supervise, evaluate and communicate any problems with job performance with the employee. If an employer applies said guidelines and it still proves necessary to fire the employee, it would not have been due to any failure of the employer but because the employee failed to correct any performance deficiencies. The discharge becomes attributable more to the employee than to the employer.

An employer may not fire on the basis of unlawful discrimination covering race, national origin, sex, age,

physical or mental disability including pregnancy, creed, religion, political belief – public sector, color, and marital status or in retaliation for an employee’s refusal to violate public policy or for reporting a violation of public policy as defined in 39-2-903 (7) Definitions. “Public policy” means a policy in effect at the time of the discharge concerning the public, health, safety, or welfare established by the constitutional provision, statute, or administrative rule. This includes employees who are still in their probationary period.

The Montana Wrongful Discharge From Employment Act has influenced other states to adopt similar passages into their employment laws, especially those that limit the amount of money that a discharged employee may receive. Interestingly, in 1991, the Conference of Commissioners On Uniform State Laws recommended a law similar to the Montana law for enactment in all States called the Model Employment Termination Act (META). Like WDFEA in Montana, META eliminates at-will employment for a “good cause” standard for termination and restricts damages that a plaintiff may receive to lost wages for back pay. Instead of lost wages for future earnings, under META, a plaintiff may receive reinstatement. The Montana WDFEA encourages arbitration in settling a case, 39-2-914, as an alternative to court but under META, arbitration would be mandatory and at the public’s expense. No state has yet to enact META though it has been proposed in many states since 1991.

If you have questions or need more information or for a copy of Montana Codes Annotated, Visit
http://data.opi.state.mt.us/bills/mca_toc/39.htm
or contact livingstonjsc@mt.gov.
Susan Hanken, Livingston Job Service
406 222-0520.

Sexual Harassment of Teen Workers Increase each year

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In September of 2006, sexual harassment came to the attention of America. Mark Foley, a U.S. House Representative, was sexually harassing teenaged Congressional pages. He resigned the same month. In March of 2007, a West Coast McDonald's Restaurants franchise paid out \$550,000 to eight female part-time teen workers who charged that a male manager had sexually harassed them. In March of 2003, a Northern California Bagel shop paid a settlement of \$150,000 to six women, several of whom were still teenagers between the ages of 16-18. The teenagers, along with several older women were sexually harassed by the store manager. There are many other examples that can be given but what is evident is that teen workers being sexually harassed at work is rising as is the number of complaints being filed.

It was estimated back in 2004 that there were around seven million people between the ages of 16 and 19 who were currently employed, and three million between 15 and 17 who were working during the school year. Those numbers have increased since that time. A survey conducted by a professor at the University of Southern Maine showed 35 percent of 712 high-school students interviewed said they had experienced sexual harassment while working part-time. That's almost 250 students!

Motel, retail and restaurant establishments may be the most vulnerable to sexual harassment claims. Most teens are employed in entry-level, part-time positions with an informal working atmosphere. Usually, in these types of establishments there is high turnover among the workers, including teenagers. That makes it more difficult for the employers to make sure that everyone receives training



By Elizabeth A. Anderson

to prevent sexual harassment. Most teens are not fully aware of the laws to protect their rights as workers or what to do when those rights are violated. It has been found that many violations of younger worker's rights go unreported because kids do not know that they don't have to "just grin and bear it" in order to keep their jobs.

Sexual harassment is determined on a case-by-case basis. While some acts may not be offensive to one employee, it may have an entirely different effect on someone else. The acts that constitute sexual harassment include:

- ◊ Propositions or pressure to engage in sexual activity.
- ◊ Repeated body contact.
- ◊ Repeated sexual jokes, innuendoes or comments.
- ◊ Constant leering or staring.
- ◊ Inappropriate comments concerning appearance.
- ◊ Hiring or promoting a sex partner over more qualified persons.
- ◊ Harassment based upon gender in nontraditional employment.

Employers may be liable for monetary compensation and other forms of relief to employees who are victims of sexual harassment by an owner/manager, a supervisor, a co-worker, or a non-employee in the workplace (generally a customer). This is true whether or not the employer knew of the sexual harassment, or when the employer knew or should have known of the sexual harassment and failed to take immediate corrective action.

What can you as an employer do?

Prevention is your best tool for eliminating sexual harassment. Have a sexual harassment policy that is effective in resolving complaints and make sure your employees know it. Employees should be encouraged to inform the harasser that his or her behavior is unwelcome and to document incidents of harassment, including specific statements of what occurred and the names of any

witnesses. If this does not resolve the problem, the individual should follow your reporting procedures.

You should have a written sexual harassment policy that defines and gives examples of prohibited sexual conduct. It should provide a procedure for reporting policy violations and it should prohibit retaliation against a complainant, regardless of the outcome of the investigation. It should also warn of potential consequences, including termination. The harassment policy should be printed in employee handbooks and posted in appropriate locations in the workplace. Other ways of preventing sexual harassment can include a method of communicating the policy to all employees; a complaint procedure that allows reporting of the harassment to someone other than an immediate supervisor and that encourages victims of harassment to come forward. Also have an investigation procedure that provides as much confidentiality as possible and that will ensure a prompt and thorough investigation of every complaint, and a follow-up procedure to make sure the harassment has ended and that no retaliation occurred. Last, but not least, inform employees of their right to report sexual harassment to the Montana Human Rights Bureau or the federal Equal Employment Opportunity Commission.

Preventing sexual harassment in the workplace requires an investment of time and personnel. However, significant savings in legal fees and health-care costs as well as improving morale and increasing production can offset these costs.

Make sure that all employees and management understand sexual harassment, that you develop a sexual harassment policy that is communicated to all employees and that you establish effective procedures for reporting complaints. Then enforce your policies.



Davis-Bacon/Prevailing Wage Information

By Elizabeth A. Anderson

The original intent of a prevailing wage law is to stabilize local wages and industry standards by preventing unfair and/or unregulated bidding practices.

The laws were intended to encourage the development of a high-skill, high-wage growth path for the labor market in general, and the construction labor market in particular.

The prevailing wage law, the Davis-Bacon Act, created requires that construction workers on public projects be paid the wages and benefits that are found by the Department of Labor to be "prevailing" for similar work in or near the locality in which the construction project is to be performed. Federal Davis-Bacon rates cover work on public projects in the areas of building, highway, heavy, and residential construction. Federal prevailing

wages are amended throughout the year so it is important to check the rates on a regular basis. If an occupation is not included in the rate list you may contact the regional office as follows:

Federal Wage and Hour Division: 1-866-487-9243 or (801) 524-5706

US Department of Labor – ETA
150 East Social Hall, Suite 695
Salt Lake City, UT 84111-1534

For current rates you can use the following link:

<http://www.gpo.gov/davisbacon/mt.html>

Right now, the Davis-Bacon Act as amended, requires that each contract over \$2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract.

Because the U.S. Constitution prohibits the federal government from dictating contract terms for the states in construction, the

Davis-Bacon Act does not cover construction work funded entirely by state and local governments. State prevailing wage laws set a minimum pay for construction workers on state and local projects, and the terms of the respective prevailing wage statutes among the states differ substantially.

The payment of prevailing wages may serve to attract workers with more experience and training. Increased labor productivity may result in fewer hours of labor being required, thus offsetting the higher wage rate.

When prevailing wage regulations are eliminated, workers wages and benefits go down. Indeed, that is the stated aim of deregulation – the cutting of wages and benefits in hopes of cutting costs. But when this does occur, experienced and trained workers leave the industry. A younger, less experienced and less trained set of workers shoulder the job. This not only puts at risk the quality of work, it puts at risk the workers themselves.

3rd Annual Livingston Job Fest 2008

Wednesday, April 23, 2008- 12 Noon till 6 pm at the Civic Center
Sponsored by Livingston Area Chamber of Commerce and the Livingston Job Service



It is Job Fest time again! We are having the Fest a little earlier this year due to Employer feedback. The Job Fest will be doing an advertising blitz this year to ensure many qualified applicants. This is an effective way to reach many interested and qualified candidates in a single day. Job seekers will be encouraged to bring applications and resumes with them for your convenience. Employers will once again be treated to the Employer Hospitality Room.

**~In this tight labor market booths will fill early~
CALL TODAY AND RESERVE YOUR BOOTH TODAY!**

Employer Name & Address:

City – State & Zip:

Phone – Fax & Email:

Contact Person:

Registration for 1 Table: \$ 35.00

Electrical Outlets: yes no

Regional newspapers will be contacted about the Job Fest. The Livingston Enterprise will be doing a pullout in the paper and will be contacting you to place an advertisement in the paper. We look forward to seeing you in the Spring!

PAYMENT INFORMATION

Please make checks payable to Livingston JSEC. Complete Registration and mail to:
Livingston Job Service, Attn: Gail, 220 East Park Street, Livingston, MT 59047.
Or fax to: 406-222-1593

For those wanting to pay by credit card please phone the Livingston Chamber of Commerce at 222-0850
for credit card payment.

Other questions call or e-mail Gail Habener at 222-8904 or ghabener@mt.gov



Livingston Job Service Employers Committee

220 East Park Street

Livingston, MT 59047

Contact Susan Hanken at: 222-8907 or 222-0520

ASSISTANCE FOR BUSINESS CLINIC

The Assistance for Business Clinics are developed to assist NEW and ESTABLISHED employers, accountants, bookkeepers and lawyers in constructing a proactive approach to prevent unnecessary claims and/or charges by providing updated reporting of state withholding, Unemployment Tax requirements, minimum wage laws, overtime laws, civil rights laws and federal tax incentives.

Presentations by:

- Wage & Hour
- Worker's Compensation
- Safety
- Human Rights
- Unemployment Insurance Tax and Benefits
- Withholding Tax



May 14, 2008 at the Best Western Yellowstone Inn

Registration: 7:30-8:00

Opening remarks: 8:00-8:10

Agency Presentations: 8:10-4:30

Cost: \$40.00

Includes: Lunch Taco/Tostada Bar & beverages

****Check if needing CPE _ (8.0 hrs) or CLE _ (7to7.5 credits)**

Registration Form - Assistance for Business Clinics

Make Checks Payable to JSEC

Name of Business _____ Phone Number _____

Address _____ Town/Zip _____

& Name(s) of those attending _____